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No. _____

## In the Supreme Court of the United States

*October Term, 1992*

Edward J. Petrus, Jr., M.D.
and
The Eye Center of Austin
*Petitioners,*

v.

Inspector General
Department of Health and Human Services
*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the agency can retroactively apply a six-year statute of limitations for a Civil Monetary Penalty Law (CMPL) claim after the applicable five-year limit expired?

2. Whether a CMPL penalty after a criminal conviction and fine for the same conduct violates the Double Jeopardy Clause of the Fifth Amendment?

3. Whether the release of grand jury materials for use in a civil administrative hearing is a due process violation?

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**In the Supreme Court of the United States**
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*On Petition for a Writ of Certiorari*
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**PETITION FOR WRIT OF CERTIORARI**

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Petitioners, Edward J. Petrus, Jr. M.D. and the Eye Center of Austin, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Fifth Circuit and the Department of Health and Human Services.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, **Petrus v. Inspector General**, 966 F.2d 675 (5th Cir. 1992), affirming the Order of the Department of Health & Human Services (C-147, Dec. No. 1264) imposing a penalty and assessment against the Petitioners, is reproduced in Appendix A. The final decision on review of the agency's decision is reproduced in Appendix B.

## STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit affirming the CMPL penalty was filed on June 3, 1992 is reproduced in Appendix A. The opinion of the Court of Appeals for the Fifth Circuit denying the Petition for rehearing was filed on July 1, 1992, is reproduced in Appendix C. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, and 42 U.S.C. § 1320a-7a(e).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...

## STATEMENT OF THE CASE

The Inspector General (IG) of DHHS sent Edward J. Petrus, Jr., M.D. (Petrus) a letter proposing to impose a penalty and assessment under the Civil Monetary Penalties Law (CMPL) on June 7, 1989. (IG-97). Petrus responded by noting the five-year statute of limitations expired, and that a civil penalty in addition to a criminal sanctions was double punishment. (Exhibit A-3, App.Br.). The Eye Center of Austin (Eye Center) was never served.[1] The IG obtained an ex parte release of grand jury

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[1]Fifth Circuit ruled that Petrus could not represent the Eye Center, because he is not a licensed attorney. **In re K.M.A., Inc.**, 652 F.2d 398, 399 (5th Cir. Unit B 1981). Petrus claimed that a defunct corporation may defend actions in

materials for use in an administrative hearing held on March 19-24, 1990.[2] Petrus filed a motion to dismiss the CMPL claim for abuse of grand jury process which was denied by the ALJ. The ALJ also refused to allow the admission of Petitioner's exhibits, refused postponement or consideration of Petitioner's health status, refused to release a medical report on Petrus, and demonstrated bias and prejudice by interfering with the Petitioner's questioning of witnesses and distracted the hearing with his admitted note passing with his assistant. (Exhibit A-8, App.Br.). Petitioners' motions that the ALJ disqualify himself were also denied. The ALJ filed an opinion against the Petitioners, jointly and severally,[3] in the amount of $180,000 on October 10, 1990, which was affirmed by the Appellate Panel of DHHS on July 5, 1991. Petitioners filed a notice of appeal on September 5, 1991,

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court without the benefit of counsel. **Regal Const. Co. v. Hansel**, 596 S.W.2d 150, 153 (Tex.Civ.App.-Houston [1st Dist]) re. denied 1980, quoting **Humble Oil & Refining Co. v. Blankenburg**, 149 Tex. 498, 235 S.W.2d 891 (1951). Appellate court did not address whether the agency obtained jurisdiction over the Eye Center. A copy of that decision is reproduced in Appendix D.

[2]The agency refused to release to the Petitioners a copy of their application for the ex parte release of grand jury materials. Their application and order releasing the grand jury materials was sealed by the court.

The issue of whether the agency qualified under Rule 6(e)(3), F.R.Cr.P. for the release of grand jury materials for use in a civil administrative hearing was presented to the Fifth Circuit, **In the Matter of: Grand Juries Impanelled 1/10/83, 6/01/83/, and 8/16/84**, (91-8096), which ruled on November 5, 1991, that relief could only be obtained by judicial review of agency's final decision.

[3]CMPL does not provide for joint and several liability, and prohibits vicarious liability. **Inspector General v. Frank P. Silver**, DAB No. C-19 (1988).

and oral argument was held on June 2, 1992.[4] Appellate Court affirmed the agency decision on June 3, 1992, and rehearing denied on July 1, 1992.

Petitioners were charged under the CMPL (42 U.S.C. § 1320a-7a) with violating: § 1320a-7a(a)(1)(A) for improperly filing claims for items or services that were not provided as claimed,[5] and § 1320a-7a(a)(1)(D) for claims submitted during a period of suspension.[6] The agency alleged that Petrus furnished services and identified other physicians as the provider, and that he provided those services while under suspension.[7]

The hearing testimony verified that all claims were compiled and submitted solely by Ms. Brooks, an employee of the Eye Center (Tr. 1153), who based the information for completing the claims from the bill (Tr. 1153, 1189), medical chart, handwriting, and her knowledge of which doctor treated the patient (Tr. 1189, 1198). Ms. Wilson, a receptionist at the Eye Center, stated that she knew which doctor treated the patient because the doctor brought the patient and chart back to her (Tr. 778), and

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[4] Petrus appeared pro se and was prevented from speaking for the Eye Center.

[5] The IG stated "[t]here was no evidence at the trial which suggested that Respondents billed for any services that were not in fact provided." (IG brief p.96). No claim was made that any patient was charged for services they did not receive, were charged for a more extensive service than they received, or were overcharged.

[6] Only the Eye Center submitted claims, and was never suspended.

[7] Such actions are not a violation of § 1320a-7a(a)(1)(A) or § 1320a-7a(a)(1)(D), and if true are only a violation of § 1320a-7a(a)(1)(B) which was not charged by the agency.

she and Ms. Brooks then filed the claim with the correct physician's provider number based on their personal knowledge. All the claim forms were signed by Ms. Brooks (Tr. 1155), and presented in the name of the Eye Center of Austin (Tr. 1199). Petrus never signed any claims (Tr.1200), did not participate in the preparation of claims (Tr. 1200), and never reviewed or changed any claims (Tr.835, 1159-60).

The Eye Center hired two physicians in 1983, while Petrus was on suspension from Medicare/Medicaid, to treat Medicare and Medicaid patients: Drs. Paul Malsky and Gregory Baer (Tr. 418, 434). The agency alleged that Petrus treated Medicare and Medicaid patients and used Dr Malsky or Dr. Baer's provider number on the claim. The basis of that allegation is the fact that some of the notes in the medical charts were not in the handwriting of Drs. Malsky or Baer, who alleged that they always wrote notes in the chart for patients they treated. Dr. Malsky stated under oath that he never had any incomplete medical charts (Tr. 646, 731-33), but Ms. Brooks and Ms. Wilson both stated under oath that he frequently left the medical charts incomplete (Tr.1190-91), which were later completed by Petrus. When the charts were examined at a later date, the handwriting was that of Petrus (Tr.642, 522). Dr. Malsky also billed Medicare from his Killeen office for the same services billed from the Eye Center (Tr.1549). Dr. Malsky was visited by an investigator for DHHS after noting his double billing (Tr.506), and following that visit more medical charts were left incomplete (Tr.814-15).

When Ms. Brooks was asked by ALJ Kessel "When you say that the charts were not completed by Dr. Malsky, what was it that he would leave out?" Ms. Brooks stated "What he did to the patient." (Tr.1197-98). Dr. Malksy testified during the hearing and grand jury that if the writing in the medical chart was not in his handwriting, he didn't treat the patient (Tr.522). Dr. Baer,

under oath before the grand jury and agency hearing, testified that he always completed his medical charts, but when questioned about his incomplete medical charts at the hearing admitted, "I didn't write on the surgical record. I didn't write on the patient's chart. I didn't write anywhere. You did all of that." (Tr.350). The agency claimed that Petrus actually treated the patients while on suspension and used the other physician's provider number on the claim forms. Such action, if true, is not a violation of either § 1320a-7a(a)(1)(A) or (D) of the CMPL.

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the Supreme Court regarding retroactivity of Medicare statutes.

The Fifth Circuit erred when it rendered a McJudgment and "affirmed" the final decision of the Department of Health & Human Services. The agency decision retroactively applied a statute of limitations to the Medicare Act contrary to the Court's ruling in **Bowen v. Georgetown University Hospital**, 109 S.Ct 468 (1988).

The agency charged that claims filed by the Eye Center, from June 1983 until February 1984, were improperly filed. A CMPL charge, against the Petitioners, was docketed on August 17, 1989,[8] and exceeded the five-year statute of limitations by five months. The agency erred when it ruled that the claims are

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[8]Rule 3, F.R.Civ.P., states that "A civil action is commenced by filing a complaint with the court." After filing the complaint, the action is pending until a "summons and complaint shall be served together." Rule 4(d). The IG failed to serve the summons and complaint within 120 days and this CMPL complaint should be dismissed. Rule 4(j), F.R.Civ.P.

governed by a six-year statute of limitations.

The IG admitted that the statute of limitations rests upon their interpretation of the "plain language of Section 15." (HHS Br. p.23). Section 15. Effective Dates[9] clearly states under "Claims" that the effective date of the new six-year statute of limitations shall "*apply to claims presented on or after the effective date specified in subsection (a)...*" The Act became effective on September 1, 1987, therefore the new six-year statute of limitations applies only to claims presented on or after that date. The IG admits that the claims were presented for payment by the Eye Center from June 8, 1983 to February 27, 1984 (HHS Br. p.21), and thus is *only covered by the five-year statute of limitations.*

The Civil Monetary Penalties Law (CMPL), 42 U.S.C. § 1320a-7a (1983) had a five year statute of limitations for claims filed prior to 1987. (48 FR 38827, August 26, 1983).

> We have included final § 101.132, which bars the Department from proceeding against a party for violations concerning which a right of action has accrued more than five years before the filing of a Notice of Proposed Determination as provided in § 101.109(a).
>
> ...statutes are presumed to operate prospectively. (48 FR 38828).

The CMPL was revised on September 30, 1986, and continued to have a five year statute of limitations. (51 FR 34777). The

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[9]Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 15(a)-(e), 101 Stat. 698, refers to the CMPL and is reproduced in part in Appendix E.

statute of limitations was changed to 6 years on December 31, 1987, for all violations that occur *after* that date. (52 FR 48412). The agency stated in the Federal Register on December 31, 1987 that:

> Those regulations at 42 CFR 1003.182 currently provide that "no action under this part shall be entertained unless commenced pursuant to § 1003.109(a) of this part, within 5 years from the date on which the right of action accrued."

The last "date on which the right of action accrued" was January 21, 1984, therefore the agency was without authority to act after January 22, 1989, and lacked subject matter jurisdiction.

Statutes of limitation are construed prospective, and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive. **Russell v. United States**, 278 U.S. 181 (1929); **United States v. St. Louis S. F. & T. R. Co.**, 270 U.S. 1 (1925). Thus, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute of limitations, will not be affected by it, but will be governed by the original statute unless a contrary intention is expressed by the legislature in the new law. All legislation must be applied prospectively. The Supreme Court in **Union Pacific Railroad Co. v. Laramie Stock Yards Co.**, 231 U.S. 190 (1913) declared:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past.

The Court ruled against the retroactive application of statutes.

There is a substantive element, in the operation of a limitation statute, that is the protection of potential defendants from a protracted fear of litigation. **Pearson v. Northeast Airlines Inc.**, 309 F.2d 553 (2nd Cir. 1962). The **Russell** Court held against a retroactive change of a five year statute of limitations which had almost expired and quoted **United States v. Magnolia Petroleum Co.**, 276 U.S. 160, 162 (1927) that

> Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.

**Russell**, 276 U.S. at 187.

The legislature in § 15 of Pub.L. 100-93, enacted December 31, 1987, specifically refer to the prospective application of effective dates. DHHS published their *final rule* regarding 42 CFR Part 1003. The agency adheres to the principles of the Administrative Procedure Act (APA), which defines "rule" to mean "the whole or part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the *future*."

The ALJ cited **Bernstein v. Sullivan**, 914 F.2d 1395 (10th Cir. 1990) to support their claim for the retroactive application of a six-year statute of limitations. **Bernstein** is distinct in that Bernstein was indicted for services he did not perform, and before the five-year statute expired signed an agreement with the IG which tolled the running of the five-year statute of limitations. Following a decision by the ALJ that the new six-year statute would apply to any action initiated after September 1, 1987, both

parties agreed that the ALJ could enter judgment against Bernstein. Such actions by Bernstein waived his constitutional claims. **Bernstein** is clearly distinguished from the present case.

A Fifth Circuit opinion regarding CMPL, **Griffon v. United States Dept. of Health and Human Services**, 802 F.2d 146 (5th Cir. 1986), ruled that CMPL could not be applied retroactively to acts of fraud committed before the Act's effective date. The Court noted:

> On August 13, 1981, Congress passed the CMPL, a civil statute providing monetary penalties for individuals who file false Medicare or Medicaid claims. Congress passed the CMPL, as an alternative procedure to existing federal and state enforcement mechanisms, after determining that those mechanisms were inadequate to combat the increasing incidence of Medicare fraud.

The Court in footnote 5 noted that "[t]he CMPL, thus was 'intended to provide an alternative to criminal proceedings." The Court noted that "[o]n December 30, 1982, the Secretary of HHS promulgated proposed rules for implementing the statute by notice and comment in the Federal Register. 47 Fed. Reg. 58,309 (1982) "and that [t]he Secretary recognized that *Congress did not specifically make 42 U.S.C. § 1320a-7a retroactive*" but that "the CMPL as conceived as an alternative remedy to criminal prosecution of cases of fraud, which were not being prosecuted' 48 Fed. Reg. 38,828 (1983)." *Id* at 150. Thus "Congress generally intended the CMPL to be a procedural, civil alternative to ameliorate the pattern of underenforcement of criminal statutes." *Id*. at 151. The Court decided against retroactively applying procedural aspects of the CMPL and held that:

> the only question presented was purely one of law, namely, whether the regulations of the Secretary of Health and Human Services retroactively applying the procedural aspects of the Civil Monetary Penalties Law (CMPL), 42 U.S.C. § 1320a-7a, were consistent with that statute...we held they were not.

**Griffon**, 832 F.2d at 52.

This Court resolved the issue of retroactivity of Medicare statutes in **Bowen** stating that "the threshold question is whether the Medicare Act authorizes retroactive rulemaking." The Court ruled that the APA, as a general matter, forbids retroactive rulemaking and the Medicare Act, by specific terms, bars retroactive rules. Justice Scalia, in a concurring opinion noted that "[t]he first part of the APA's definition of "rule" states that a rule" has only a "future effect" and that "rules have legal consequences only for the future." He went on to note that "[q]uite simply, a rule is an agency statement 'of future effect' not 'of future effect and/or reasonable past effect'" and that "[r]etroactive legislation has always been looked upon with disfavor." Thus, the revision of the statute of limitations in 1987, has no effect on the preexisting five year statute of limitations in effect in 1984, and the agency has no authority to pursue any penalty from the Petitioners.

## II. The Court of Appeals for the Fifth Circuit has affirmed an agency decision regarding the issue of double jeopardy for criminal and civil punishment for the same offense contrary to their prior decisions and in conflict with a decision of this Court.

The Fifth Circuit erred when it affirmed the final decision of the agency which held that the criminal conviction and civil

penalty was not double jeopardy. The agency decision is inconsistent with their decision in **United States v. Sanchez-Escareno**, 950 F.2d 193 (5th Cir. 1991), and in conflict with this Court's decision in **United States v. Halper**, 490 U.S. 435, 109 S.Ct. 1892 (1989).

Petrus was incarcerated and fined $55,000 for claims submitted in 1983. In 1989, the IG claimed $180,000 penalty for the same conduct. The court erred when is held that the double punishment does not violate the Double Jeopardy Clause of the Fifth Amendment.

This Court in **United States v. Halper**, 490 U.S. 435, 109 S.Ct. 1892, 1903 (1989), held that:

> In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct, and receive a judgment that is not rationally related to the goal of making the Government whole.

The agency refused to document any dollar loss to the government, and refused to prove any damages. The Fifth Circuit in **United States v. Sanchez-Escareno**, 950 F.2d 193 (5th Cir. 1991) held that the rationale underlying the double jeopardy clause is that the sovereign, with all its power and resources, should not be permitted to subject a defendant to embarrassment, expense and ordeal by repeated attempts to convict for alleged offenses; that the double jeopardy protection applies to felonies, minor crimes and misdemeanors alike; and that criminal fines are treated in the same manner as prison sentences for purposes of double jeopardy and multiple punishment analysis.

**Sanchez-Escareno,** quoting **Halper,** ruled that "the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." **Halper** maintained that CMPL damages are limited to the amount of fraud itself,[10] and ancillary costs, such as the costs of detection and investigation.[11] The agency declined to document any loss to the Government, therefore any penalty assessed against the Petitioners is not remedial but constitutes a second punishment and violates the Double Jeopardy Clause of the Fifth Amendment.

## III. The Court of Appeals affirmed an agency decision regarding the release of grand jury materials contrary to their prior decisions, and contrary to the applicable decisions of this Court.

The Fifth Circuit erred when it affirmed the final decision of the agency which held that grand jury materials can be released in a civil administrative hearing. The appellate decision is counter the their decision **In re J. Ray McDermott & Co., Inc.,** 622 F.2d 166 (5th Cir. 1980), and in conflict with this Court's decision in **United States v. Baggot**, 463 U.S. 476 (1983)

The agency sought and obtained an ex parte release of grand jury materials for use in a civil administrative hearing in violation of Rule 6, F.R.Cr.P. Grand Jury secrecy is maintained

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[10] Actual damages are limited to items or services which were not provided, but the Inspector General admits that all the items or services were provided. (IG Br. p.96).

[11] There are no valid documented costs of detection and investigation, because the IG denied that any costs of detection and investigation existed in the December 6, 1989 discovery request. (R-63, Exhibit #2).

under Rule 6(e), F.R.Cr.P. but may be disclosed under Rule 6(e)(3) Exceptions.[12] The (C)(i) disclosure requires the release of grand jury materials "preliminarily to or in connection with a judicial proceeding." The Fifth Circuit **In Re J. Ray McDermott & Co., Inc.**, 622 F.2d 166 (5th Cir. 1980) held that where a judicial proceeding by a government agency is only a possibility, the agency is not entitled to disclosure of matters occurring before a federal grand jury under the "judicial proceedings" exception. The Court in **United States v. Young**, 494 F. Supp. 57 (E.D. Texas 1980) discussed at great length the release of grand jury materials in an administrative hearing. The Court held that the rule authorizing disclosure of grand jury material, in the phrase "preliminarily to or in connection with a judicial proceeding" should, at least, mean that requested grand jury material will be used in preparation for judicial proceeding that is more than a remote possibility, and thus plans to hold administrative hearing would not alone justify production of requested transcripts. The

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[12] Federal Rule Criminal Procedure 6(e)

(3) Exceptions -

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to -

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made -

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Court also noted:

> Application of Rule 6 should not become a game in which parties secure release of grand jury material for use in a non-judicial proceeding merely by showing some relationship between a non-judicial proceeding and future judicial proceeding.

494 F. Supp. at 60.

Some courts have interpreted "judicial proceeding" to mean only a proceeding in a United States District Court. See, **United States v. Downey**, 195 F.Supp. 581, 584 (D.C. Ill. 1961); **United States v. Crolich**, 101 F. Supp. 782, 784 (D.C. Ala. 1952). Other courts have construed that "judicial proceeding" does not apply to an administrative proceeding or investigation. See, **In re J. Ray McDermott & Co.**, 622 F.2d 166 (5th Cir. 1980); **United States v. Young**, 494 F. Supp. 57 (D.C. Tex. 1980); **In re Special February, 1975 Grand Jury**, 662 F.2d 1232 (7th Cir. 1981); **United States v. Bates**, 627 F.2d 349 (D.C. Cir. 1980).

This Court in, **United States v. Baggot**, 463 U.S. 476 (1983), considered what is meant by the words "preliminarily to or in connection with a judicial proceeding" in Rule 6(e)(3)(C)(i). The Court held that this does not include disclosure of grand jury material to the Internal Revenue Service for its use in conducting a civil tax investigation to determine liability and to assess any tax deficiency. Justice Brennan, writing for the Court, said that the words just quoted from the Rule are "an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." "If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted." The Court went on to note, "It follows that disclosure is not appropriate for use in an IRS audit of civil

tax liability, because the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels." 463 at 480.

The IG in the administrative cause was not using the grand jury materials to conduct litigation, but to assess a penalty under the CMPL in an administrative hearing, therefore disclosure under (C)(i) is not permitted according to the **Baggot** Court decision.

## CONCLUSION

For all the foregoing reasons, Petitioners Edward J. Petrus, Jr., M.D. and the Eye Center of Austin, respectfully pray that their petition for writ of certiorari be granted in order for this Court to review the judgments and opinion of the United States of Appeals for the Fifth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the Solicitor General, Department of Justice, Washington, D.C. 20530, by United States mail, on the 28th day of September, 1992

Edward J. Petrus, Jr., M.D.